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'Scheme to extort' or zealous advocacy?

A controversial San Rafael attorney, known for filing hundreds of lawsuits based on the Americans with Disabilities Act, defended his actions during a trial before the State Bar Court last month, denying a series of allegations by the bar and calling about a dozen witnesses who said they could not believe he acted improperly. THOMAS E. FRANKOVICH [#74414], 62, is accused of three counts of misconduct stemming from what the bar characterizes as "a scheme to extort money from defendants." He also faces a fourth charge after a federal judge found he improperly communicated with a defendant who was represented by a lawyer in another case.

In 2005, Frankovich was ordered by the Central District of California to file no further ADA-based lawsuits without obtaining court permission. U.S. District Judge Edward Rafeedie earlier declared Frankovich's frequent client, Jarek Molski, a vexatious litigant after he filed 156 ADA lawsuits in one year. The Ninth Circuit upheld the lower court order in 2007 after Frankovich appealed. The Supreme Court declined to hear the case.

Under the ADA, private litigants can sue in federal court for injunctive relief and, if successful, can obtain attorneys fees and costs. In California, plaintiffs also can win money damages under the Unruh Civil Rights Act and the California Disabled Persons Act. The damages can be significant — \$4,000 per violation.

Rafeedie, since deceased, found that Frankovich's client made false claims and that his litigation strategy was designed to "coerce defendants into quick settlements." Further, Rafeedie said that Frankovich typically waited a year after the alleged injuries to file suit in order to maximize damages. Only one Molski matter had gone to trial, he said, indicating a "quick desire for settlement."

In addition to barring Frankovich from filing any more suits in the central district, Rafeedie referred him to the State Bar for discipline.

The bar accuses Frankovich of three counts as a result of Rafeedie's order: seeking to mislead a judge and two counts of moral turpitude — engaging in a scheme to extort and alleging that a client suffered bodily injury without appropriately apportioning each defendant's responsibility for the injuries.

According to the bar charges, Frankovich filed at least 223 lawsuits in federal courts in California in 2004 alleging violations of the ADA. In addition to the suits filed for Molski, 40 were filed on behalf of either Les Jankey, an individual who uses a wheelchair, or Patrick Connolly, a disabled individual who is president of Disability Rights Enforcement Education Services (DREES). DREES also was a co-plaintiff. A total of about 400 lawsuits were filed on Molski's behalf between 2003-07 against various businesses alleging ADA violations.

Reviewing more than 200 cases filed by Frankovich, Rafeedie concluded that many of the claimed injuries were contrived in order to invoke the personal injury provisions of the defendants' insurance policies. Frankovich filed numerous complaints alleging that Molski sustained similar or identical injuries at multiple establishments on a single day. In 2004, for example, he claimed to have received two or more injuries on the same day 37 times, three or more injuries on the same day 19 times and four or more injuries the same day nine times.

Frankovich said the allegations are not based on facts and insisted that disabled persons can easily suffer repeated injuries on a daily basis. "That's what these people face and that's what happens to them if they face architectural barriers," he testified.

The complaints reviewed by the court sought damages of \$4,000 per day from the date a plaintiff visited the defendant business to the date repairs were completed, according to the bar charges. "The court found that it was [Frankovich's] regular practice to wait up to one year

before filing a lawsuit, during which time the requested daily damages continued to accrue," according to the charges. For example, in a case in which Molski sued Mandarin Touch, a Solvang restaurant, for violating access requirements, damages could total more than \$1.4 million, the court said. Frankovich denied making any settlement demands for daily damages and called the \$1.4 million "a mathematical calculation by Judge Rafeedie to, in my opinion, fit his own agenda."

After filing suit, the charges allege, Frankovich sent a copy of the complaint to the defendant with a letter "that could be viewed as intimidating as well as misleading and inaccurate." Frankovich, however, called the letters "educational" and said they instructed plaintiffs how to repair architectural barriers and reduce their exposure to damages. But the bar alleges that by making "misleading statements to defendants about hiring counsel, the merits of their defense and discussing whether their insurance might cover any claims," Frankovich committed acts of moral turpitude. Filing complaints that allege bodily injury without any facts to support the claims amounted to misleading a judge, the bar charges.

The federal court also noted that only one of Molski's 400 cases went to trial and cited the high settlement rate as "an indication of extortion scheme."

During a six-day trial last month, Frankovich was unrepentant and instead mounted a spirited defense of his practices that included testimony from several clients with disabilities as well as opposing counsel. In a lengthy narrative presentation from the witness stand, Frankovich said his motive always has been to "be of service to people with disabilities." Aside from admitting to a small error in one complaint, the pony-tailed lawyer denied all the charges and said he is a target because of his high profile and extensive media attention.

Rafeedie is to blame for his problems with the bar, Frankovich said: "He had a political agenda, he took everything out of context, he twisted everything." Motions to declare his clients vexatious litigants have been brought and denied in other federal districts in California, he said, and the courts have offered conflicting decisions about his cases. "When the opportunity presents itself," Frankovich said, he will resume filing cases in the central district "with a vengeance."

Undaunted by death threats and hate mail, he added, "nothing is going to stop me from going forward. Period. I'm not going to back off."

In 2006, Frankovich also was suspended for six months by another judge in the central district for communicating with a represented party. The facts of that case are considered conclusive and the bar court can impose punishment ranging from a reproof to a suspension.

The trial is expected to wrap up this month but a decision is not likely for several months. Bar prosecutor Erica Dennings said she expects to ask that Frankovich's license be suspended. Any findings by a bar court judge must be approved by the Supreme Court.

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